

1 **FEDERAL ELECTION COMMISSION**

2
3 **FIRST GENERAL COUNSEL'S REPORT**

4
5 MUR: 7287

6 DATE COMPLAINT FILED: October 16, 2017

7 DATE OF NOTIFICATION: October 19, 2017

8 RESPONSE RECEIVED: October 30, 2017

9 DATE ACTIVATED: February 9, 2018

10
11 EXPIRATION OF SOL: August 1, 2022

12 ELECTION CYCLE: 2018

13
14 **SOURCE:**

American Democracy Legal Fund

15
16 **RESPONDENTS:**

Russell C. Fagg

17 Russ Fagg Senate Committee f/k/a Russ Fagg

18 Senate Exploratory Committee and Lorna Kuney in

19 her official capacity as treasurer¹

20
21 **RELEVANT STATUTES AND**
22 **REGULATIONS:**

52 U.S.C. § 30101(2)

52 U.S.C. § 30102(e)

52 U.S.C. § 30103(a)

11 C.F.R. § 100.72

11 C.F.R. § 100.131

11 C.F.R. § 101.1(a)

11 C.F.R. § 102.1(a)

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31 **INTERNAL REPORTS CHECKED:**

Disclosure Reports

32
33 **FEDERAL AGENCIES CHECKED:**

None

34
35 **I. INTRODUCTION**

36 The Complaint alleges that Russell C. Fagg and Russ Fagg Senate Committee and Lorna
37 Kuney in her official capacity as treasurer (the "Committee") (collectively "Respondents")

¹ The Russ Fagg Senate Exploratory Committee, the committee OGC notified, became Russ Fagg Senate Committee on October 19, 2017, when it filed its Statement of Organization as Fagg's principal campaign committee. Since then, however, two disclosure reports identify Russ Fagg for US Senate, not Russ Fagg Senate Committee, as Fagg's principal campaign committee. See 2017 Year-End Report (Jan. 30, 2018); April 2018 Quarterly Report (Apr. 12, 2018). Consistent with the Statement of Organization, we make recommendations as to Russ Fagg Senate Committee f/k/a Russ Fagg Senate Exploratory Committee and Lorna Kuney in her official capacity as treasurer. See Factual & Legal Analysis at 1, MUR 6449 (Jon Bruning).

1 violated the Federal Election Campaign Act of 1971, as amended (the "Act"), by failing to
2 register and report with the Commission after Fagg became a candidate.² According to the
3 Complaint, Fagg engaged in extensive campaign activities and made public statements indicating
4 that he became a candidate before October 14, 2017, when he officially announced his
5 candidacy.³ Respondents argue that their activities and statements did not trigger candidacy
6 prior to Fagg's official announcement but were consistent with testing-the-waters activities.⁴

7 For the reasons that follow, we conclude that Fagg's activities and statements do not
8 indicate that he became a candidate before October 14, 2017. Because Fagg timely filed his
9 Statement of Candidacy and designated his principal campaign committee within 15 days of the
10 date he became a candidate, and the Committee filed its Statement of Organization within 10
11 days of its designation, we recommend that the Commission find no reason to believe that
12 Russell C. Fagg violated 52 U.S.C. § 30102(e) and find no reason to believe that Russ Fagg
13 Senate Committee f/k/a Russ Fagg Senate Exploratory Committee and Lorna Kuney in her
14 official capacity as treasurer violated 52 U.S.C. § 30103(a).

15 II. FACTUAL BACKGROUND

16 On June 14, 2017, Fagg established the Russ Fagg Senate Exploratory Committee
17 describing the committee's purpose as a "testing the waters' exploratory committee for Russ
18 Fagg, who is considering running for the US Senate."⁵ On October 14, 2017, Fagg announced

² All cites to the Complaint are to the "Corrected Complaint," which American Democracy Legal Fund filed after being notified that its original Complaint contained a defective notarization.

³ See Compl. at 1.

⁴ See Resp. at 7-13.

⁵ Compl., Ex. 3 § 1.

1 his Senate candidacy.⁶ Five days later, Fagg filed the Statement of Candidacy and designated
2 Russ Fagg Senate Committee as his principal campaign committee.⁷ The Committee filed its
3 Statement of Organization the same day.⁸

4 The Complaint alleges that Fagg became a candidate no later than August 2017 by
5 disseminating biographical information, policy positions, and news related to his candidacy, and
6 by soliciting donations and volunteers through the exploratory committee's website.⁹ The
7 Complaint also alleges that the Committee engaged in general public political advertising by
8 distributing flyers to the general public and asking volunteers to get them "into the hands of the
9 people."¹⁰

10 In addition, the Complaint alleges that Fagg engaged in partisan political activity and
11 described himself as a candidate for office before his official announcement.¹¹ In support, the
12 Complaint points to an August 2017 video posted on the exploratory committee's website and
13 Fagg's public statements that attacked Senator Tester, the incumbent and his potential general
14 election opponent.¹² The Committee's webpage posted the video under the heading, "Reasons
15 Russ is Considering Running" along with the statement, "The National Republican Senatorial
16 Committee produced this excellent video. It shows areas where Senator Tester's campaign

⁶ Resp., Ex. 1 ¶ 18.

⁷ Statement of Candidacy (Oct. 19, 2017).

⁸ Statement of Organization (Oct. 19, 2017).

⁹ See Compl. at 8.

¹⁰ See *id.*

¹¹ See *id.* at 1, 9-11.

¹² See *id.* at 5, 9-10.

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1 promises haven't been kept. It illustrates why Russ is considering running for U.S. Senate."¹³
2 The Complaint also cites statements concerning Senator Tester that Fagg made at a Billings
3 Petroleum Club event in late August 2017 and during a radio show in September 2017.¹⁴ The
4 Complaint concludes that Fagg's statements attacking Senator Tester show that he had already
5 decided to be a candidate.

- 6 • "Senator Tester is a nice man but he's very liberal. People don't know that out in
7 Montana It's my opportunity to say, he's really gone to the left, really following the
8 Democratic line."¹⁵
9
10 • "He voted against Judge Gorsuch," "was the deciding vote for Obamacare," and "voted
11 for gun control."¹⁶
12
13 • "[H]e's really got people bamboozled," "he's not voting Montana values," and "I feel
14 very strongly that he should be replaced."¹⁷
15
16 • "He went in as a so-called reformer, but he's no longer a reformer. He's part of the
17 system, he's part of the swamp that needs to be drained. I'm really disappointed in
18 Senator Tester and where he's gone and at the end of the day he doesn't represent
19 mainstream Montana, if he ever did, he certainly doesn't now."¹⁸
20

21 Along with these statements critical of Senator Tester, the Complaint also alleges that
22 Fagg made statements referencing his candidacy in August and September 2017. At the Billings
23 Petroleum Club event in late August 2017, the Complaint argues that Fagg "essentially
24 announc[ed] that he [was] running for the U.S. Senate" when he stated, "I think I've got an
25 excellent shot of getting through the primary," and "I think I'm the best chance of, of winning

¹³ Compl., Ex. 14. A video on YouTube matches the video described in the Complaint, and it does not mention Fagg by name. See <https://www.youtube.com/watch?v=Apu8heryM18>.

¹⁴ Compl. at 4, 9-11, Exs. 17, 18.

¹⁵ Compl. at 4, Ex. 17 at 12.

¹⁶ *Id.*; see Compl., Ex. 18 at 1.

¹⁷ Compl. at 10, Ex. 18 at 1.

¹⁸ Compl. at 5, Ex. 17 at 13.

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1 that general election in November 2018. And I certainly would appreciate your support.”¹⁹ The
2 Complaint also attaches a September 12, 2017, article entitled, “Republican Fagg insists he’s still
3 ‘exploring’ U.S. Senate candidacy,” which quotes Fagg as saying, “I think I would have the best
4 shot of all the candidates to run against Sen. Tester.”²⁰ The Complaint alleges that in the same
5 article, Fagg publicly touted his endorsements from five former elected officials and stated that
6 their support “really makes the decision a lot easier.”²¹

7 Respondents do not dispute that they engaged in these activities or that Fagg made these
8 statements. Rather, they argue that Fagg’s activities and statements were made to determine
9 whether sufficient support existed for a potential candidacy and that the statements on their face
10 do not support a conclusion that Fagg had decided to become a candidate before October 14,
11 2017.²² They point out that the Committee never referred to Fagg as a candidate in connection
12 with its testing-the-waters activities.²³ Instead, Respondents argue that Fagg carefully complied
13 with the Commission’s testing-the-waters regulations, including contacting the Commission for
14 guidance on the testing-the-waters rules.²⁴ Respondents point to various statements Fagg made
15 that he was not a candidate, and they contend that the Complaint took Fagg’s other statements
16 out of context.²⁵ For example, at the Billings Petroleum Club event cited in the Complaint,

¹⁹ Compl. at 10-11, Ex. 18 at 2, 5.

²⁰ Compl. at 10-11, Ex. 13 at 1. This article also quotes Fagg’s statements from the event in late August — that he has “an excellent shot of getting through the (Republican) primary” and that he is “the best chance of winning that general election in November 2018.” Compl., Ex. 13 at 1.

²¹ Compl. at 4, 11, Ex. 13 at 1.

²² *See* Resp. at 4, 7-12.

²³ *See id.*

²⁴ *See* Resp. at 4, Ex. 1 ¶¶ 9-14.

²⁵ *See* Resp. at 2, 10-12.

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1 Respondents note that Fagg stated that he thought he had the best shot “should I decide to run to
2 take on Senator Tester.”²⁶ In addition, Respondents note that the September 12, 2017, article on
3 which the Complaint relies also includes Fagg’s statement, “No, I am not a candidate at this
4 point, and I made that very clear.”²⁷ Thus, Respondents contend that Fagg did not become a
5 candidate before October 14, 2017, the date he announced his candidacy.²⁸

6 III. LEGAL ANALYSIS

7 Title 52 U.S.C. § 30101(2) provides that an individual becomes a candidate if he or she
8 receives contributions or makes expenditures in excess of \$5,000.²⁹ Once an individual meets
9 the \$5,000 threshold, the candidate has 15 days to designate a principal campaign committee by
10 filing a Statement of Candidacy with the Commission.³⁰ The principal campaign committee
11 must file a Statement of Organization within 10 days of its designation³¹ and must file disclosure
12 reports with the Commission in accordance with 52 U.S.C. § 30104(a) and (b).³²

13 The Commission, however, has established limited “testing the waters” exemptions from
14 these thresholds, which permit an individual to test the feasibility of a campaign for federal

²⁶ *Id.* at 12 (quoting Compl., Ex. 18 at 2).

²⁷ *Id.* at 11 (quoting Compl., Ex. 13 at 1).

²⁸ Respondents also argue that two other factors not mentioned in the Complaint regarding their testing-the-waters activities weigh in their favor. They explain that Fagg did not conduct his testing-the-waters activities over a protracted period of time, as these activities only lasted four months. Resp. at 13. They also argue that there is no allegation that Respondents were attempting to amass funds to be spent after Fagg became a candidate. *Id.* Between June 14, 2017, and October 14, 2017, the Committee reported on its Year-End Report contributions totaling \$73,650, which included a \$25,000 contribution from Fagg himself, and disbursements totaling \$35,208.79. *See* 2017 Year-End Report (Jan. 1, 2018). For this entire reporting period, the Committee reported contributions of \$615,454 and disbursements of \$146,771.

²⁹ 52 U.S.C. § 30101(2); 11 C.F.R. § 100.3(a)(1).

³⁰ 52 U.S.C. § 30102(e)(1); 11 C.F.R. § 101.1(a).

³¹ 52 U.S.C. § 30103(a); 11 C.F.R. § 102.1(a).

³² *See, e.g.*, Factual & Legal Analysis at 6, MUR 6735 (Joseph A. Sestak); Factual & Legal Analysis at 5, MUR 6449 (Jon Bruning); Factual & Legal Analysis at 6, MUR 6775 (Hillary Clinton).

1 office without becoming a candidate under the Act.³³ These exemptions exclude from the
2 definition of "contribution" and "expenditure" funds received and payments made to determine
3 whether an individual should become a candidate.³⁴ These regulations seek to draw a distinction
4 between activities directed to an evaluation of the feasibility of one's candidacy and conduct
5 signifying that a decision to become a candidate has been made.³⁵ Testing-the-waters activities
6 include, but are not limited to, payments for polling, telephone calls, and travel, and only funds
7 permissible under the Act may be used for such activities.³⁶ An individual who is testing the
8 waters need not register or file disclosure reports with the Commission unless and until the
9 individual subsequently decides to run for federal office.³⁷

10 The Commission has stated that testing-the-waters exemptions are "explicitly limited
11 'solely' to activities designed to evaluate a potential candidacy."³⁸ The exemptions do not apply
12 "to individuals who have decided to become candidates."³⁹ In determining whether an individual
13 has moved from testing the waters to candidate status, the Commission considers whether the
14 individual has engaged in activities or made statements that would indicate that the individual

³³ See 11 C.F.R. §§ 100.72, 100.131; Factual & Legal Analysis at 6-7, MUR 6775 (Hillary Clinton); Factual & Legal Analysis at 8, MUR 6776 (Niger Innis); Factual & Legal Analysis at 6, MUR 6735 (Joseph A. Sestak).

³⁴ 11 C.F.R. §§ 100.72(a), 100.131(a).

³⁵ Advisory Opinion 1981-32 (Askew).

³⁶ 11 C.F.R. §§ 100.72(a), 100.131(a).

³⁷ *See id.*

³⁸ Payments Received for Testing the Waters Activities, 50 Fed. Reg. 9,992, 9,993 (Mar. 13, 1985).

³⁹ 11 C.F.R. §§ 100.72(b), 100.131(b).

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1 has decided to run for federal office.⁴⁰ “[T]he determination of whether an individual has
2 crossed the line from ‘testing the waters’ to campaigning must be made on a case-by-case
3 basis.”⁴¹

4 Fagg received more than \$5,000 in contributions as of June 14, 2017, and made more
5 than \$5,000 in expenditures as of July 18, 2017.⁴² Thus, the question presented here is whether
6 Respondents’ activities between June 14, 2017, and October 14, 2017, when Fagg announced his
7 candidacy, constitute testing-the-waters activities. The Complaint argues that Fagg became a
8 candidate before October 14, 2017, based on the following activities: (1) the Committee’s
9 dissemination of biographical information, policy positions, and news related to Fagg’s
10 candidacy, and its solicitation of donations and volunteers; (2) the Committee’s distribution of
11 flyers to the general public; (3) and Fagg’s partisan speeches and public statements.⁴³ We
12 address each in turn.

13 The Commission has explained that disseminating biographical information,
14 communicating policy positions, and soliciting donations and volunteers are permissible testing-
15 the-waters activities so long as the potential candidate is conducting such activities to determine

⁴⁰ Factual & Legal Analysis at 6-7, MUR 6449 (Jon Bruning); First Gen. Counsel Rpt. at 10, MUR 6533 (Perry Haney for Congress). Commission regulations set forth a non-exhaustive list of activities that indicate that an individual is no longer testing the waters and has decided to become a candidate: (1) using general public political advertising to publicize his or her intention to campaign for federal office; (2) raising funds in excess of what could reasonably be expected to be used for exploratory activities or undertaking activity designed to amass campaign funds that would be spent after he or she becomes a candidate; (3) making or authorizing written or oral statements that refer to him or her as a candidate for a particular office; (4) conducting activities in close proximity to the election or over a protracted period of time; and (5) taking action to qualify for the ballot under state law. 11 C.F.R. §§ 100.72(b), 100.131(b).

⁴¹ 50 Fed. Reg. at 9,993.

⁴² As of June 14, 2017, Fagg’s contributions totaled \$30,400, and as of July 18, 2017, his expenditures totaled \$5,528.43. See 2017 Year-End Report at 10, 85, 137, 141-42.

⁴³ Compl. at 8-11.

1 whether to become a candidate.⁴⁴ The Committee's website posed the question "Should Russ
2 Fagg Run for Senate?"⁴⁵ This indicates that the website sought input from the public on whether
3 Fagg *should become a candidate*, and provided a vehicle for people to sign up for Fagg's mailing
4 list.⁴⁶ Language on the website makes clear that the purpose of the donations was to fund
5 activities that the Commission has previously found were permissible testing-the-waters
6 activities.

7 Financial support is a crucial metric in Russ's decision making process
8 about running for U.S. Senate. Your contribution can make the difference
9 between running and not running. Every dollar raised will go toward
10 paying for the *travel, postage, consulting and polling* necessary to
11 determine whether there's enough support for Russ to run for U.S.
12 Senate.⁴⁷

13
14 Immediately below this paragraph is the statement, "Russ is *considering* a run for the U.S.
15 Senate."⁴⁸

16 Further, the website's address, www.russfagg.com, does not contain any reference to a
17 campaign, and the website's logo, which the Complaint alleges was similar to a nametag Fagg

⁴⁴ See Advisory Opinion 1981-32 (Askew); Factual & Legal Analysis at 4, 7-8, MUR 6330 (Bill Johnson) (noting that respondent's materials, including biographical packet, state carefully that "Johnson was only considering his options"); Factual & Legal Analysis at 10, MUR 6224 (Carly Fiorina) (finding no reason to believe because website allowing individuals to "get involved" and soliciting donations for "testing the waters purposes" did not appear inconsistent with respondent's testing-the-waters efforts); MUR 5661 (Butler) (finding no reason to believe where candidate used volunteers to distribute literature to determine whether his background would attract sufficient interest and volunteers for a U.S. Senate race if he decided to run).

⁴⁵ Compl., Ex. 4.

⁴⁶ See Compl., Exs. 4, 6; see MUR 6462 (Trump Organization) (approving recommendation of no reason to believe respondent became a candidate for office, noting, among other things, that the name of the website, (ShouldTrumpRun.com) and its content, which included statements from the respondent, were couched in terms of whether he should run for president).

⁴⁷ Compl., Ex. 9 (emphasis added); see 11 C.F.R. §§ 100.72(a), 100.131(a) ("Testing the waters activities include, but are not limited to, payments for polling, telephone calls, and travel . . ."); Advisory Opinion 1981-32 (Askew) (concluding that employment of political consultants is permissible so long as such an undertaking is for the purpose of deciding whether to become a candidate).

⁴⁸ Compl., Ex. 9 (emphasis added).

1 wore at an event in late September 2017,⁴⁹ contains the phrase "Exploratory Committee." As
2 shown below, this logo was changed after Fagg became a candidate.



Testing-the-Waters Logo⁵⁰



Official Campaign Logo⁵¹

3 The Commission has explained that "any name selected for the testing the waters effort
4 must avoid expressions such as 'Askew for President,' or 'Askew in '84,'" or other names, titles,
5 or headings with "similar types of campaign connotations."⁵² Although the testing-the-waters
6 logo's reference to "U.S. Senate" makes it similar to these campaign expressions, we are
7 unpersuaded that this logo is sufficient by itself to establish candidacy because it also includes
8 the "Exploratory Committee" language (albeit in much smaller print than the rest of the text on
9 the nametag), and the website clearly states in a number of places that Fagg was testing the
10 waters.⁵³

⁴⁹ Compl. at 5.

⁵⁰ This logo was taken from an August 13, 2017, version of the exploratory committee website. See <https://web.archive.org/web/20170913231947/https://www.russfagg.com/>. This date aligns with the Complaint's allegation that Fagg became a candidate in mid-August, but not earlier, since no earlier version of the exploratory committee website was found.

⁵¹ See <http://www.russformontana.com/>.

⁵² Advisory Opinion 1981-32 (Askew).

⁵³ The logo's inclusion of the phrase "Exploratory Committee" distinguishes it from the logo in MUR 6999 (David Larsen), which the Commission found was evidence of candidacy but nonetheless dismissed with an admonishment, and the logo in MUR 7261 (Levi for Colorado) (open matter), which we explained was also evidence of candidacy in recommending that the Commission dismiss under *Heckler v. Chaney*, 470 U.S. 821 (1985). Also unlike in this matter, in MUR 6999 (David Larsen), the committee used a website address with a reference to a campaign, "DavidLarsenForCongress."

1 In addition, the information in the record is insufficient to conclude that Fagg used
2 general public political advertising to publicize his intention to campaign for federal office and
3 therefore was no longer testing the waters.⁵⁴ The Complaint, relying on a page of the
4 Committee's website inviting visitors to request flyers, alleges that Fagg disseminated "public
5 political advertising" by distributing flyers to the general public.⁵⁵ However, we have no
6 information as to the flyers' content, the number of flyers distributed, or how and when they
7 were distributed.⁵⁶

8 Finally, the Complaint alleges that Fagg's partisan speeches and public statements
9 "essentially announcing" his candidacy demonstrate that he decided to run for office before his
10 announcement.⁵⁷ The Commission has stated that the testing-the-waters exemption becomes
11 inapplicable when an individual's activity takes on a partisan political quality indicating that the
12 individual has decided to become a candidate.⁵⁸ For instance, the Commission concluded that
13 the testing-the-waters exemption was inapplicable where the respondent solicited funds against a

⁵⁴ 11 C.F.R. §§ 100.72(b), 100.131(b) (noting that general public political advertising is an activity that indicates that an individual is no longer testing the waters). "General public political advertising" includes "communications by broadcast, satellite or cable, newspaper, magazine, outdoor advertising facility, mass mailings, phone banks, and Internet communications placed for a fee on another website, all generally requiring payment to a third-party intermediary to reach the public." Factual & Legal Analysis at 9, MUR 6224 (Carly Fiorina) (footnote omitted). "Mass mailing" is defined as a mailing "of more than 500 pieces of mail matter of an identical or substantially similar nature within any 30-day period." 11 C.F.R. § 100.27.

⁵⁵ Compl. at 3, 8.

⁵⁶ The webpage announcing the availability of flyers was addressed to "County Officers and Leaders," and contained the following statement: "Getting [the flyers] into the hands of the people would really help me find out what Montanans think of the possibility of me running." Compl., Ex. 11.

⁵⁷ See Compl. at 9-10.

⁵⁸ Advisory Opinion 1981-32 (Askew).

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1 specifically named opponent.⁵⁹ Here, Fagg's statements that Senator Tester is "not voting
2 Montana values,"⁶⁰ and that "[h]e's part of the system" that "needs to be drained,"⁶¹ do not
3 indicate that Fagg had decided to run. These and other statements, while critical of Senator
4 Tester, were not made in connection with activity such as fundraising against him. They are
5 similar to those in MUR 5661 (Keith Butler), in which the Commission found that the
6 respondent had not become a candidate when he distributed literature that included statements
7 that his potential opponent was "indeed vulnerable. Ask 100 people to name what she has done.
8 They can't say what she brings to the table. Our state needs more assistance from
9 Washington."⁶²

10 Further, contrary to the Complaint's allegations, almost all of Fagg's statements about his
11 political plans were conditional.⁶³ The Complaint quotes Fagg as saying that he has "an
12 excellent shot of getting through the primary,"⁶⁴ but Fagg's full statement reads, "I've got an
13 excellent shot of getting through the primary. *And I think I actually have the best shot should I*

⁵⁹ See Commission Certification at ¶¶ 1-2, MUR 5693 (Paul Aronsohn) (Nov. 27, 2007) (finding probable cause); Gen. Counsel Rpt. 2 at 9, MUR 5693 (Paul Aronsohn) (recommending probable cause and explaining that respondent's statement that "[e]very dollar we receive in the next few weeks can help us prepare for this fight against Scott Garrett" demonstrated that his activities had taken on a partisan political quality relevant to conducting a campaign, not testing the feasibility of running for office); Factual & Legal Analysis at 8-9, MUR 6449 (Jon Bruning) (soliciting funds against a specifically named opponent showed that the respondent was no longer merely evaluating the viability of running but had decided to campaign for office).

⁶⁰ Compl., Ex. 18 at 1.

⁶¹ Compl., Ex. 17 at 13.

⁶² First Gen. Counsel Rpt. at 13, 15-16, MUR 5661 (Keith Butler); Commission Certification at ¶¶ 8-9, MUR 5661 (Keith Butler) (Oct. 27, 2006).

⁶³ See Statement of Reasons, Comm'rs. Petersen, Hunter, McGahn, & Weintraub at 1-2, MUR 5930 (Kirk Schuring) (concluding that respondent's conditional public statements "failed to establish that he had definitively decided to become a federal candidate"); First Gen. Counsel's Rpt. at 12, MUR 6776 (Niger Innis) (explaining that the Commission has approved reason to believe and probable cause findings where a potential candidate's statements clearly indicated the individual's decision to run).

⁶⁴ Compl. at 10, Ex. 18 at 2.

1 *decide to run* to take on Senator Tester.”⁶⁵ This statement and a related statement that he “*would*
2 have the best shot of all the candidates to run against Sen. Tester”⁶⁶ are conditional; they are not
3 unequivocal expressions of candidacy.⁶⁷ Only one statement that Fagg made at the Billings
4 Petroleum Club event in late August 2017 presents a closer question: “I think I’m the best
5 chance of . . . winning that general election in November 2018. And I certainly would appreciate
6 your support.”⁶⁸ We nevertheless conclude that this statement is insufficient to trigger candidacy
7 based on the facts and circumstances of this case. At least twice during this August 2017 event,
8 Fagg made clear that he was not a candidate at that time.⁶⁹ Further, the purpose of the event,
9 Fagg explains, “was to provide information about . . . [his] experience and views; in return, he
10 wanted to evaluate the response from the crowd to help him decide whether [he] should run for
11 the Senate.”⁷⁰ Concluding the event with “I’m the best chance of winning that general election”
12 and “I certainly would appreciate your support” is not necessarily inconsistent with Fagg’s stated
13 purpose of gauging support for a *potential* run.⁷¹

⁶⁵ Compl., Ex. 18 at 2 (emphasis added).

⁶⁶ Compl., Ex. 13 at 1 (emphasis added).

⁶⁷ See Statement of Reasons, Comm’rs. Petersen, Hunter, McGahn, & Weintraub at 2-3, MUR 5930 (Kirk Schuring) (explaining that conditional statements of candidacy are insufficient to trigger candidacy); Statement of Reasons, Comm’rs. Petersen, Hunter, McGahn, & Weintraub at 2-3, MUR 5934 (Fred D. Thompson) (noting that ambiguous statements are insufficient); Factual & Legal Analysis at 8, MUR 6472 (Diane Gooch) (explaining that indefinite public statements are insufficient to trigger candidacy).

⁶⁸ Compl. at 4, 10-11, Ex. 18 at 5.

⁶⁹ See Compl., Ex. 18 at 1 (“I’m not even a candidate yet.”); *id.* at 2 (“I think I actually have the best shot should I decide to run to take on Senator Tester.”).

⁷⁰ Resp. at 12.

⁷¹ See First Gen. Counsel Rpt. at 14-15, MUR 5661 (Keith Butler) (explaining that brochure that was distributed by the respondent “is not facially inconsistent with the purpose” the respondent “ascribed to it” — that is, the brochure “was intended to gauge whether his ‘background would attract sufficient interest and volunteers for a U.S. Senate race, if [he] were to make a final decision to run’” (alteration in original)).

1 Moreover, even if that single statement can be interpreted as a reference to his candidacy,
2 when taken in context with the rest of his statements during the August 2017 event, it appears to
3 be an inadvertent misstatement, which does not necessarily indicate that he decided to become a
4 candidate.⁷² “[A] mere ‘slip up,’” the Commission explained, is insufficient; there must be
5 “some objective deliberateness.”⁷³ Given the circumstances surrounding Fagg’s statement and
6 the other objective information outlined above, we believe that Fagg was still exploring whether
7 to run at that time.⁷⁴

8 For all of these reasons, the available information regarding Respondents’ activities and
9 public statements between June 14, 2017, and October 14, 2017, is not sufficient to find reason
10 to believe that Fagg made the decision to run for U.S. Senate before his official announcement
11 on October 14, 2017. Because Fagg timely filed his Statement of Candidacy and designated his
12 principal campaign committee within 15 days of when he became a candidate, and the
13 Committee filed its Statement of Organization within 10 days of that designation, we recommend
14 that the Commission find no reason to believe that Russell C. Fagg violated 52 U.S.C.
15 § 30102(e) and find no reason to believe that Russ Fagg Senate Committee f/k/a Russ Fagg
16 Senate Exploratory Committee and Lorna Kuney in her official capacity as treasurer violated
17 52 U.S.C. § 30103(a).

⁷² See Advisory Opinion 2015-09 at 6 n.3 (“A demonstrably inadvertent misstatement, however, does not necessarily indicate that the individual has decided to become a candidate.”).

⁷³ Statement of Reasons, Comm’rs. Lenhard, Mason, Toner, von Spakovsky, & Weintraub at 3, MURs 5672 & 5733 (Davis).

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1 **IV. RECOMMENDATIONS**

- 2 1. Find no reason to believe that Russell C. Fagg violated 52 U.S.C. § 30102(e);
3
4 2. Find no reason to believe that Russ Fagg Senate Committee f/k/a Russ Fagg
5 Senate Exploratory Committee and Lorna Kuney in her official capacity as
6 treasurer violated 52 U.S.C. § 30103(a);
7
8 3. Approve the attached Factual and Legal Analysis;
9
10 4. Approve the appropriate letters; and
11
12 5. Close the file.
13

14 Lisa J. Stevenson
15 Acting General Counsel
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17 Kathleen M. Guith
18 Associate General Counsel for Enforcement
19

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: Russell C. Fagg MUR: 7287
Russ Fagg Senate Committee f/k/a Russ Fagg Senate
Exploratory Committee and Lorna Kuney in her
official capacity as treasurer¹

I. INTRODUCTION

This matter was generated by a Complaint filed with the Federal Election Commission (the "Commission"). See 52 U.S.C. § 30109(a)(1). The Complaint alleges that Russell C. Fagg and Russ Fagg Senate Committee and Lorna Kuney in her official capacity as treasurer (the "Committee") (collectively "Respondents") violated the Federal Election Campaign Act of 1971, as amended (the "Act"), by failing to register and report with the Commission after Fagg became a candidate.² According to the Complaint, Fagg engaged in extensive campaign activities and made public statements indicating that he became a candidate before October 14, 2017, when he officially announced his candidacy.³ Respondents argue that their activities and statements did not trigger candidacy prior to Fagg's official announcement but were consistent with testing-the-waters activities.⁴

As discussed below, Fagg's activities and statements do not indicate that he became a candidate before October 14, 2017. Because Fagg timely filed his Statement of Candidacy and designated his principal campaign committee within 15 days of the date he became a candidate,

¹ The Russ Fagg Senate Exploratory Committee became Russ Fagg Senate Committee on October 19, 2017, when it filed its Statement of Organization as Fagg's principal campaign committee.

² All cites to the Complaint are to the "Corrected Complaint," which American Democracy Legal Fund filed after being notified that its original Complaint contained a defective notarization.

³ See Compl. at 1.

⁴ See Resp. at 7-13.

1 and the Committee filed its Statement of Organization within 10 days of its designation, the
2 Commission finds no reason to believe that Russell C. Fagg violated 52 U.S.C. § 30102(e) and
3 finds no reason to believe that Russ Fagg Senate Committee f/k/a Russ Fagg Senate Exploratory
4 Committee and Lorna Kuney in her official capacity as treasurer violated 52 U.S.C. § 30103(a).

5 **II. FACTUAL BACKGROUND**

6 On June 14, 2017, Fagg established the Russ Fagg Senate Exploratory Committee
7 describing the committee's purpose as a "testing the waters' exploratory committee for Russ
8 Fagg, who is considering running for the US Senate."⁵ On October 14, 2017, Fagg announced
9 his Senate candidacy.⁶ Five days later, Fagg filed the Statement of Candidacy and designated
10 Russ Fagg Senate Committee as his principal campaign committee.⁷ The Committee filed its
11 Statement of Organization the same day.⁸

12 The Complaint alleges that Fagg became a candidate no later than August 2017 by
13 disseminating biographical information, policy positions, and news related to his candidacy, and
14 by soliciting donations and volunteers through the exploratory committee's website.⁹ The
15 Complaint also alleges that the Committee engaged in general public political advertising by
16 distributing flyers to the general public and asking volunteers to get them "into the hands of the
17 people."¹⁰

⁵ Compl., Ex. 3 § 1.

⁶ Resp., Ex. 1 ¶ 18.

⁷ Statement of Candidacy (Oct. 19, 2017).

⁸ Statement of Organization (Oct. 19, 2017).

⁹ *See* Compl. at 8.

¹⁰ *See id.*

1 In addition, the Complaint alleges that Fagg engaged in partisan political activity and
2 described himself as a candidate for office before his official announcement.¹¹ In support, the
3 Complaint points to an August 2017 video posted on the exploratory committee's website and
4 Fagg's public statements that attacked Senator Tester, the incumbent and his potential general
5 election opponent.¹² The Committee's webpage posted the video under the heading, "Reasons
6 Russ is Considering Running" along with the statement, "The National Republican Senatorial
7 Committee produced this excellent video. It shows areas where Senator Tester's campaign
8 promises haven't been kept. It illustrates why Russ is considering running for U.S. Senate."¹³
9 The Complaint also cites statements concerning Senator Tester that Fagg made at a Billings
10 Petroleum Club event in late August 2017 and during a radio show in September 2017.¹⁴ The
11 Complaint concludes that Fagg's statements attacking Senator Tester show that he had already
12 decided to be a candidate.

- 13 • "Senator Tester is a nice man but he's very liberal. People don't know that out in
14 Montana It's my opportunity to say, he's really gone to the left, really following the
15 Democratic line."¹⁵
- 16 • "He voted against Judge Gorsuch," "was the deciding vote for Obamacare," and "voted
17 for gun control."¹⁶
- 18 • "[H]e's really got people bamboozled," "he's not voting Montana values," and "I feel
19 very strongly that he should be replaced."¹⁷
20

¹¹ *See id.* at 1, 9-11.

¹² *See id.* at 5, 9-10.

¹³ Compl., Ex. 14. A video on YouTube matches the video described in the Complaint, and it does not mention Fagg by name. *See* <https://www.youtube.com/watch?v=Apu8heryMl8>.

¹⁴ Compl. at 4, 9-11, Exs. 17, 18.

¹⁵ Compl. at 4, Ex. 17 at 12.

¹⁶ *Id.*; *see* Compl., Ex. 18 at 1.

¹⁷ Compl. at 10, Ex. 18 at 1.

- 1 • “He went in as a so-called reformer, but he’s no longer a reformer. He’s part of the
2 system, he’s part of the swamp that needs to be drained. I’m really disappointed in
3 Senator Tester and where he’s gone and at the end of the day he doesn’t represent
4 mainstream Montana, if he ever did, he certainly doesn’t now.”¹⁸
5

6 The Complaint also alleges that Fagg made statements referencing his candidacy in
7 August and September 2017. At the Billings Petroleum Club event in late August 2017, the
8 Complaint argues that Fagg “essentially announc[ed] that he [was] running for the U.S. Senate”
9 when he stated, “I think I’ve got an excellent shot of getting through the primary,” and “I think
10 I’m the best chance of, of winning that general election in November 2018. And I certainly
11 would appreciate your support.”¹⁹ The Complaint also attaches a September 12, 2017, article
12 entitled, “Republican Fagg insists he’s still ‘exploring’ U.S. Senate candidacy,” which quotes
13 Fagg as saying, “I think I would have the best shot of all the candidates to run against Sen.
14 Tester.”²⁰ The Complaint alleges that in the same article, Fagg publicly touted his endorsements
15 from five former elected officials and stated that their support “really makes the decision a lot
16 easier.”²¹

17 Respondents do not dispute that they engaged in these activities or that Fagg made these
18 statements. Rather, they argue that Fagg’s activities and statements were made to determine
19 whether sufficient support existed for a potential candidacy and that the statements on their face
20 do not support a conclusion that Fagg had decided to become a candidate before October 14,

¹⁸ Compl. at 5, Ex. 17 at 13.

¹⁹ Compl. at 10-11, Ex. 18 at 2, 5.

²⁰ Compl. at 10-11, Ex. 13 at 1. This article also quotes Fagg’s statements from the event in late August — that he has “an excellent shot of getting through the (Republican) primary” and that he is “the best chance of winning that general election in November 2018.” Compl., Ex. 13 at 1.

²¹ Compl. at 4, 11, Ex. 13 at 1.

1 2017.²² They point out that the Committee never referred to Fagg as a candidate in connection
2 with its testing-the-waters activities.²³ Instead, Respondents argue that Fagg carefully complied
3 with the Commission's testing-the-waters regulations, including contacting the Commission for
4 guidance on the testing-the-waters rules.²⁴ Respondents point to various statements Fagg made
5 that he was not a candidate, and they contend that the Complaint took Fagg's other statements
6 out of context.²⁵ For example, at the Billings Petroleum Club event cited in the Complaint,
7 Respondents note that Fagg stated that he thought he had the best shot "should I decide to run to
8 take on Senator Tester."²⁶ In addition, Respondents note that the September 12, 2017, article on
9 which the Complaint relies also includes Fagg's statement, "No, I am not a candidate at this
10 point, and I made that very clear."²⁷ Thus, Respondents contend that Fagg did not become a
11 candidate before October 14, 2017, the date he announced his candidacy.²⁸

²² See Resp. at 4, 7-12.

²³ See *id.*

²⁴ See Resp. at 4, Ex. 1 ¶¶ 9-14.

²⁵ See Resp. at 2, 10-12 (quoting Compl., Ex. 18 at 2). Respondents note that the September 12, 2017 article that the Complaint relies on also includes Fagg stating, "No, I am not a candidate at this point, and I made that very clear."

²⁶ *Id.* at 12 (quoting Compl., Ex. 18 at 2).

²⁷ *Id.* at 11 (quoting Compl., Ex. 13 at 1).

²⁸ Respondents also argue that two other factors not mentioned in the Complaint regarding their testing-the-waters activities weigh in their favor. They explain that Fagg did not conduct his testing-the-waters activities over a protracted period of time, as these activities only lasted four months. Resp. at 13. They also argue that there is no allegation that Respondents were attempting to amass funds to be spent after Fagg became a candidate. *Id.* Between June 14, 2017, and October 14, 2017, the Committee reported on its Year-End Report contributions totaling \$73,650, which included a \$25,000 contribution from Fagg himself, and disbursements totaling \$35,208.79. See 2017 Year-End Report (Jan. 1, 2018). For this entire reporting period, the Committee reported contributions of \$615,454 and disbursements of \$146,771.

1 **III. LEGAL ANALYSIS**

2 Title 52 U.S.C. § 30101(2) provides that an individual becomes a candidate if he or she
3 receives contributions or makes expenditures in excess of \$5,000.²⁹ Once an individual meets
4 the \$5,000 threshold, the candidate has 15 days to designate a principal campaign committee by
5 filing a Statement of Candidacy with the Commission.³⁰ The principal campaign committee
6 must file a Statement of Organization within 10 days of its designation³¹ and must file disclosure
7 reports with the Commission in accordance with 52 U.S.C. § 30104(a) and (b).³²

8 The Commission, however, has established “testing the waters” exemptions from these
9 thresholds; which permit an individual to test the feasibility of a campaign for federal office
10 without becoming a candidate under the Act.³³ These exemptions exclude from the definition of
11 “contribution” and “expenditure” funds received and payments made to determine whether an
12 individual should become a candidate.³⁴ These regulations seek to draw a distinction between
13 activities directed to evaluating the feasibility of one’s candidacy and conduct signifying that a
14 decision to become a candidate has been made.³⁵ Testing-the-waters activities include, but are
15 not limited to, payments for polling, telephone calls, and travel, and only funds permissible under

²⁹ 52 U.S.C. § 30101(2); 11 C.F.R. § 100.3(a)(1).

³⁰ 52 U.S.C. § 30102(e)(1); 11 C.F.R. § 101.1(a).

³¹ 52 U.S.C. § 30103(a); 11 C.F.R. § 102.1(a).

³² See, e.g., Factual & Legal Analysis at 6, MUR 6735 (Joseph A. Sestak); Factual & Legal Analysis at 5, MUR 6449 (Jon Bruning); Factual & Legal Analysis at 6, MUR 6775 (Hillary Clinton).

³³ See 11 C.F.R. §§ 100.72, 100.131; Factual & Legal Analysis at 6-7, MUR 6775 (Hillary Clinton); Factual & Legal Analysis at 8, MUR 6776 (Niger Innis); Factual & Legal Analysis at 6, MUR 6735 (Joseph A. Sestak).

³⁴ 11 C.F.R. §§ 100.72(a), 100.131(a).

³⁵ Advisory Opinion 1981-32 (Askew).

1 the Act may be used for such activities.³⁶ An individual who is testing the waters need not
2 register or file disclosure reports with the Commission unless and until the individual
3 subsequently decides to run for federal office.³⁷

4 The Commission has stated that testing-the-waters exemptions are “explicitly limited
5 ‘solely’ to activities designed to evaluate a potential candidacy.”³⁸ The exemptions do not apply
6 “to individuals who have decided to become candidates.”³⁹ In determining whether an
7 individual has moved from testing the waters to candidate status, the Commission considers
8 whether the individual has engaged in activities or made statements that would indicate that the
9 individual has decided to run for federal office.⁴⁰ “[T]he determination of whether an individual
10 has crossed the line from ‘testing the waters’ to campaigning must be made on a case-by-case
11 basis.”⁴¹

12 Fagg received more than \$5,000 in contributions as of June 14, 2017, and made more
13 than \$5,000 in expenditures as of July 18, 2017.⁴² Thus, the question presented here is whether

³⁶ 11 C.F.R. §§ 100.72(a), 100.131(a).

³⁷ *See id.*

³⁸ Payments Received for Testing the Waters Activities, 50 Fed. Reg. 9,992, 9,993 (Mar. 13, 1985).

³⁹ 11 C.F.R. §§ 100.72(b), 100.131(b).

⁴⁰ Factual & Legal Analysis at 6-7, MUR 6449 (Jon Bruning); First Gen. Counsel Rpt. at 10, MUR 6533 (Perry Haney for Congress). Commission regulations set forth a non-exhaustive list of activities that indicate that an individual is no longer testing the waters and has decided to become a candidate: (1) using general public political advertising to publicize his or her intention to campaign for federal office; (2) raising funds in excess of what could reasonably be expected to be used for exploratory activities or undertaking activity designed to amass campaign funds that would be spent after he or she becomes a candidate; (3) making or authorizing written or oral statements that refer to him or her as a candidate for a particular office; (4) conducting activities in close proximity to the election or over a protracted period of time; and (5) taking action to qualify for the ballot under state law. 11 C.F.R. §§ 100.72(b), 100.131(b).

⁴¹ 50 Fed. Reg. at 9,993.

⁴² As of June 14, 2017, Fagg’s contributions totaled \$30,400, and as of July 18, 2017, his expenditures totaled \$5,528.43. *See* 2017 Year-End Report at 10, 85, 137, 141-42.

1 Respondents' activities between June 14, 2017, and October 14, 2017, when Fagg announced his
2 candidacy, constitute testing-the-waters activities. The Complaint argues that Fagg became a
3 candidate before October 14, 2017, based on the following activities: (1) the Committee's
4 dissemination of biographical information, policy positions, and news related to Fagg's
5 candidacy, and its solicitation of donations and volunteers; (2) the Committee's distribution of
6 flyers to the general public; (3) and Fagg's partisan speeches and public statements.⁴³ We
7 address each in turn.

8 The Commission has explained that disseminating biographical information,
9 communicating policy positions, and soliciting donations and volunteers are permissible testing-
10 the-waters activities so long as the potential candidate is conducting such activities to determine
11 whether to become a candidate.⁴⁴ The Committee's website posed the question "Should Russ
12 Fagg Run for Senate?"⁴⁵ This indicates that the website sought input from the public on whether
13 Fagg *should become a candidate*, and provided a vehicle for people to sign up for Fagg's mailing
14 list.⁴⁶ Language on the website makes clear that the purpose of the donations was to fund

⁴³ Compl. at 8-11.

⁴⁴ See Advisory Opinion 1981-32 (Askew); Factual & Legal Analysis at 4, 7-8, MUR 6330 (Bill Johnson) (noting that respondent's materials, including biographical packet, state carefully that "Johnson was only considering his options"); Factual & Legal Analysis at 10, MUR 6224 (Carly Fiorina) (finding no reason to believe because website allowing individuals to "get involved" and soliciting donations for "testing the waters purposes" did not appear inconsistent with respondent's testing-the-waters efforts); MUR 5661 (Butler) (finding no reason to believe where candidate used volunteers to distribute literature to determine whether his background would attract sufficient interest and volunteers for a U.S. Senate race if he decided to run).

⁴⁵ Compl., Ex. 4.

⁴⁶ See Compl., Exs. 4, 6; see MUR 6462 (Trump Organization) (approving recommendation of no reason to believe respondent became a candidate for office, noting, among other things, that the name of the website, (ShouldTrumpRun.com) and its content, which included statements from the respondent, were couched in terms of whether he should run for president).

1 activities that the Commission has previously found were permissible testing-the-waters
2 activities.

3 Financial support is a crucial metric in Russ's decision making process
4 about running for U.S. Senate. Your contribution can make the difference
5 between running and not running. Every dollar raised will go toward
6 paying for the *travel, postage, consulting and polling* necessary to
7 determine whether there's enough support for Russ to run for U.S.
8 Senate.⁴⁷

9
10 Immediately below this paragraph is the statement, "Russ is *considering* a run for the U.S.
11 Senate."⁴⁸

12 Further, the website's address, www.russfagg.com, does not contain any reference to a
13 campaign, and the website's logo, which the Complaint alleges was similar to a nametag Fagg
14 wore at an event in late September 2017,⁴⁹ contains the phrase "Exploratory Committee." As
15 shown below, this logo was changed after Fagg became a candidate.

⁴⁷ Compl., Ex. 9 (emphasis added); see 11 C.F.R. §§ 100.72(a), 100.131(a) ("Testing the waters activities include, but are not limited to, payments for polling, telephone calls, and travel . . ."); Advisory Opinion 1981-32 (Askew) (concluding that employment of political consultants is permissible so long as such an undertaking is for the purpose of deciding whether to become a candidate).

⁴⁸ Compl., Ex. 9 (emphasis added).

⁴⁹ Compl. at 5.



Testing-the-Waters Logo⁵⁰



Official Campaign Logo⁵¹

1 The Commission has explained that “any name selected for the testing the waters effort
2 must avoid expressions such as ‘Askew for President,¹’ or ‘Askew in ‘84,’” or other names, titles,
3 or headings with “similar types of campaign connotations.”⁵² Although the testing-the-waters
4 logo’s reference to “U.S. Senate” makes it similar to these campaign expressions, the
5 Commission is unpersuaded that this logo is sufficient by itself to establish candidacy because it
6 also includes the “Exploratory Committee” language (albeit in much smaller print than the rest of
7 the text on the nametag), and the website clearly states in a number of places that Fagg was
8 testing the waters.⁵³

9 In addition, the information in the record is insufficient to conclude that Fagg used
10 general public political advertising to publicize his intention to campaign for federal office and

⁵⁰ This logo was taken from an August 13, 2017, version of the exploratory committee website. See <https://web.archive.org/web/20170913231947/https://www.russfagg.com/>. This date aligns with the Complaint’s allegation that Fagg became a candidate in mid-August, but not earlier, since no earlier version of the exploratory committee website was found.

⁵¹ See <http://www.russformontana.com/>.

⁵² Advisory Opinion 1981-32 (Askew).

⁵³ The logo’s inclusion of the phrase “Exploratory Committee” distinguishes it from the logo in MUR 6999 (David Larsen), which the Commission found was evidence of candidacy but nonetheless dismissed with an admonishment. Also unlike in this matter, in MUR 6999 (David Larsen), the committee used a website address with a reference to a campaign, “DavidLarsenForCongress.”

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1 therefore was no longer testing the waters.⁵⁴ The Complaint, relying on a page of the
2 Committee's website inviting visitors to request flyers, alleges that Fagg disseminated "public
3 political advertising" by distributing flyers to the general public.⁵⁵ However, the Commission
4 has no information as to the flyers' content, the number of flyers distributed, or how and when
5 they were distributed.⁵⁶

6 Finally, the Complaint alleges that Fagg's partisan speeches and public statements
7 "essentially announcing" his candidacy demonstrate that he decided to run for office before his
8 announcement.⁵⁷ The Commission has stated that the testing-the-waters exemption becomes
9 inapplicable when an individual's activity takes on a partisan political quality indicating that the
10 individual has decided to become a candidate.⁵⁸ For instance, the Commission concluded that
11 the testing-the-waters exemption was inapplicable where the respondent solicited funds against a
12 specifically named opponent.⁵⁹ Here, Fagg's statements that Senator Tester is "not voting

⁵⁴ 11 C.F.R. §§ 100.72(b), 100.131(b) (noting that general public political advertising is an activity that indicates that an individual is no longer testing the waters). "General public political advertising" includes "communications by broadcast, satellite or cable, newspaper, magazine, outdoor advertising facility, mass mailings, phone banks, and Internet communications placed for a fee on another website, all generally requiring payment to a third-party intermediary to reach the public." Factual & Legal Analysis at 9, MUR 6224 (Carly Fiorina) (footnote omitted). "Mass mailing" is defined as a mailing "of more than 500 pieces of mail matter of an identical or substantially similar nature within any 30-day period." 11 C.F.R. § 100.27.

⁵⁵ Compl. at 3, 8.

⁵⁶ The webpage announcing the availability of flyers was addressed to "County Officers and Leaders," and contained the following statement: "Getting [the flyers] into the hands of the people would really help me find out what Montanans think of the possibility of me running." Compl., Ex. 11.

⁵⁷ See Compl. at 9-10.

⁵⁸ Advisory Opinion 1981-32 (Askew); 11 C.F.R. §§ 100.72(b), 100.131(b).

⁵⁹ See Commission Certification at ¶¶ 1-2, MUR 5693 (Paul Aronsohn) (Nov. 27, 2007) (finding probable cause); Gen. Counsel Rpt. 2 at 9, MUR 5693 (Paul Aronsohn) (recommending probable cause and explaining that respondent's statement that "[e]very dollar we receive in the next few weeks can help us prepare for this fight against Scott Garrett" demonstrated that his activities had taken on a partisan political quality relevant to conducting a campaign, not testing the feasibility of running for office); Factual & Legal Analysis at 8-9, MUR 6449 (Jon Bruning) (soliciting funds against a specifically named opponent showed that the respondent was no longer merely evaluating the viability of running but had decided to campaign for office).

1 Montana values,”⁶⁰ and that “[h]e’s part of the system” that “needs to be drained,”⁶¹ do not
2 indicate that Fagg had decided to run. These and other statements, while critical of Senator
3 Tester, were not made in connection with activity such as fundraising against him. They are
4 similar to those in MUR 5661 (Keith Butler), in which the Commission found that the
5 respondent had not become a candidate when he distributed literature that included statements
6 that his potential opponent was “indeed vulnerable. Ask 100 people to name what she has done.
7 They can’t say what she brings to the table. Our state needs more assistance from
8 Washington.”⁶²

9 Further, contrary to the Complaint’s allegations, almost all of Fagg’s statements about his
10 political plans were conditional.⁶³ The Complaint quotes Fagg as saying that he has “an
11 excellent shot of getting through the primary,”⁶⁴ but Fagg’s full statement reads, “I’ve got an
12 excellent shot of getting through the primary. *And I think I actually have the best shot should I
13 decide to run to take on Senator Tester.*”⁶⁵ This statement and a related statement that he “*would*
14 have the best shot of all the candidates to run against Sen. Tester”⁶⁶ are conditional; they are not

⁶⁰ Compl., Ex. 18 at 1.

⁶¹ Compl., Ex. 17 at 13.

⁶² First Gen. Counsel Rpt. at 13, 15-16, MUR 5661 (Keith Butler); Commission Certification at ¶¶ 8-9, MUR 5661 (Keith Butler) (Oct. 27, 2006).

⁶³ See Statement of Reasons, Comm’rs. Petersen, Hunter, McGahn, & Weintraub at 1-2, MUR 5930 (Kirk Schuring) (concluding that respondent’s conditional public statements “failed to establish that he had definitively decided to become a federal candidate”); First Gen. Counsel’s Rpt. at 12, MUR 6776 (Niger Innis) (explaining that the Commission has approved reason to believe and probable cause findings where a potential candidate’s statements clearly indicated the individual’s decision to run).

⁶⁴ Compl. at 10, Ex. 18 at 2.

⁶⁵ Compl., Ex. 18 at 2 (emphasis added).

⁶⁶ Compl., Ex. 13 at 1 (emphasis added).

1 unequivocal expressions of candidacy.⁶⁷ Only one statement that Fagg made at the Billings
2 Petroleum Club event in late August 2017 presents a closer question: “I think I’m the best
3 chance of . . . winning that general election in November 2018. And I certainly would appreciate
4 your support.”⁶⁸ We nevertheless conclude that this statement is insufficient to trigger candidacy
5 based on the facts and circumstances of this case. At least twice during this August 2017 event,
6 Fagg made clear that he was not a candidate at that time.⁶⁹ Further, the purpose of the event,
7 Fagg explains, “was to provide information about . . . [his] experience and views; in return, he
8 wanted to evaluate the response from the crowd to help him decide whether [he] should run for
9 the Senate.”⁷⁰ Concluding the event with “I’m the best chance of winning that general election”
10 and “I certainly would appreciate your support” is not necessarily inconsistent with Fagg’s stated
11 purpose of gauging support for a *potential* run.⁷¹

12 Moreover, even if that single statement can be interpreted as a reference to his candidacy,
13 when taken in context with the rest of his statements during the August 2017 event, it appears to
14 be an inadvertent misstatement, which does not necessarily indicate that he decided to become a

⁶⁷ See Statement of Reasons, Comm’rs. Petersen, Hunter, McGahn, & Weintraub at 2-3, MUR 5930 (Kirk Schuring) (explaining that conditional statements of candidacy are insufficient to trigger candidacy); Statement of Reasons, Comm’rs. Petersen, Hunter, McGahn, & Weintraub at 2-3, MUR 5934 (Fred D. Thompson) (noting that ambiguous statements are insufficient); Factual & Legal Analysis at 8, MUR 6472 (Diane Gooch) (explaining that indefinite public statements are insufficient to trigger candidacy).

⁶⁸ Compl. at 4, 10-11, Ex. 18 at 5.

⁶⁹ See Compl., Ex. 18 at 1 (“I’m not even a candidate yet.”); *id.* at 2 (“I think I actually have the best shot should I decide to run to take on Senator Tester.”).

⁷⁰ Resp. at 12.

⁷¹ See First Gen. Counsel Rpt. at 14-15, MUR 5661 (Keith Butler) (explaining that brochure that was distributed by the respondent “is not facially inconsistent with the purpose” the respondent “ascribed to it” — that is, the brochure “was intended to gauge whether his ‘background would attract sufficient interest and volunteers for a U.S. Senate race, if [he] were to make a final decision to run” (alteration in original)).

1 candidate.⁷² “[A] mere ‘slip up,’” the Commission has explained, is insufficient; there must be
2 “some objective deliberateness.”⁷³ Given the circumstances surrounding Fagg’s statement and
3 the other objective information outlined above, we believe that Fagg was still exploring whether
4 to run at that time.

5 For all of these reasons, the available information regarding Respondents’ activities and
6 public statements between June 14, 2017, and October 14, 2017, is not sufficient to find reason
7 to believe that Fagg made the decision to run for U.S. Senate before his official announcement
8 on October 14, 2017. Because Fagg timely filed his Statement of Candidacy and designated his
9 principal campaign committee within 15 days of when he became a candidate, and the
10 Committee filed its Statement of Organization within 10 days of that designation, the
11 Commission finds no reason to believe that Russell C. Fagg violated 52 U.S.C. § 30102(e) and
12 finds no reason to believe that Russ Fagg Senate Committee f/k/a Russ Fagg Senate Exploratory
13 Committee and Lorna Kuney in her official capacity as treasurer violated 52 U.S.C. § 30103(a).

⁷² See Advisory Opinion 2015-09 at 6 n.3 (“A demonstrably inadvertent misstatement, however, does not necessarily indicate that the individual has decided to become a candidate.”).

⁷³ Statement of Reasons, Comm’rs. Lenhard, Mason, Toner, von Spakovsky, & Weintraub at 3, MURs 5672 & 5733 (Davis).